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CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 241.

ILLINOIS CENTRAL RAILROAD COMPANY

vs.

JOSEPH BEHRENS, ADMINISTRATOR OF THE SUCCESSION OF JOSEPH JOHN BEHRENS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED APRIL 23, 1912.

(23,179)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 9, 1913.

1 Filed 9th Day of April, 1912. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

In the United States Circuit Court of Appeals, Fifth Circuit.

Number 2317.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error,
vs.
JOSEPH BEHRENS, Administrator, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This is an action at law based on the Act of Congress of April 22, 1908, known as the Employers' Liability Act, brought by the defendant in error against the plaintiff in error for damages for the death of his son, John Joseph Behrens, alleged to have been caused by the negligence of the plaintiff in error.

There was an answer denying the averments of the petition, and the following are the facts proved and shown by the record, which are material to the question here certified:

John Joseph Behrens was killed in a head-on collision between trains of the Illinois Central Railroad and of the New Orleans Terminal Companies, during the night of November 28th, 1909, in the City of New Orleans, State of Louisiana.

The deceased was at the time of his death in the employ of the Illinois Central Railroad Company as a fireman, and was one of a crew attached to a switch engine that operated exclusively within the City of New Orleans, State of Louisiana.

2 The general employment of said switching crew using said engine was to handle over the company's tracks and other tracks in the said City of New Orleans both intrastate and interstate commerce indiscriminately; that is, they might on one trip handle cars that were brought into the City of New Orleans from without the State of Louisiana, or a mixed train containing cars either loaded or empty brought into the City of New Orleans from without the State of Louisiana, and cars loaded with freight moving entirely within the State of Louisiana, and on another trip a train made up of cars either empty or loaded with freight originating wholly within the State of Louisiana and moving to a point within said State.

At the time of the collision which resulted in Behrens' death, the train on which Behrens was working consisted of the said switch engine and thirteen cars loaded with sugar that originated in the State of Louisiana and were destined to another point within the State of Louisiana, namely, Chalmette, Louisiana. At Chalmette said switching engine and crew were to take up other cars, either loaded or empty, belonging to various railroad companies, and take them to

Harahan, Louisiana, and there turn them over to the yardmaster, who was to deliver them to various railroad systems to be transported to points within and without the State.

The case has been fully argued and submitted to this court.

This court desires the instruction of the Supreme Court of the United States for the proper decision of a proposition or question of law, and it therefore certifies to the Supreme Court the following question:

(1) At the time of the injury resulting in the death of John Joseph Behrens, was he employed in interstate commerce
3 within the meaning of the Employers' Liability Act, approved April 22, 1908?

For further certainty and information, a printed copy of the transcript is transmitted with this certificate.

DON A. PARDEE,
DAVID D. SHELBY,
T. S. MAXEY,
Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Sitting in said Cause.

4 UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Illinois Central Railroad Company, plaintiff in error, versus Joseph Behrens, defendant in error, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the City of New Orleans, Louisiana, this 9th day of April, A. D. 1912.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

5 [Endorsed:] United States Circuit Court of Appeals, Fifth Circuit. No. 2317. Illinois Central Railroad Company vs. Joseph Behrens, Adm'r. (Copy Statement of case and questions certified.)

Endorsed on cover: File No. 23,179. U. S. Circuit Court Appeals, 5th Circuit. Term No. 241. Illinois Central Railroad Company vs. Joseph Behrens, administrator of the succession of Joseph John Behrens. (Certificate.) Filed April 23d, 1912. File No. 23,179.

2

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

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ILLINOIS CENTRAL RAILROAD COMPANY

vs.

JOSEPH BEHRENS, ADMINISTRATOR OF THE SUCCESSION OF JOSEPH JOHN BEHRENS.

BRIEF FOR THE
ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error.

BLEWETT LEE,
Counsel for Plaintiff in Error.

HUNTER C. LEAKE,
GUSTAVE LEMLE,
Of Counsel.

SUPREME COURT PRINTING COMPANY, NEW ORLEANS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

ILLINOIS CENTRAL RAILROAD COMPANY

vs.

JOSEPH BEHRENS, ADMINISTRATOR OF THE SUCCESSION OF JOSEPH JOHN BEHRENS.

BRIEF

FOR THE

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error.

STATEMENT OF THE CASE.

This case arises upon a certificate made by the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, upon an action at law based upon the Federal Employers' Liability Act

of April 22, 1908. The facts as stated by the court are as follows:

> "John Joseph Behrens was killed in a head-on collision between trains of the Illinois Central Railroad and of the New Orleans Terminal Companies, during the night of November 28th, 1909, in the City of New Orleans, State of Louisiana.
>
> The deceased was at the time of his death in the employ of the Illinois Central Railroad Company as a fireman, and was one of a crew attached to a switch engine that operated exclusively within the City of New Orleans, State of Louisiana.
>
> The general employment of said switching crew using said engine was to handle over the Company's tracks and other tracks in the said City of New Orleans, both intrastate and interstate commerce indiscriminately; that is, they might on one trip handle cars that were brought into the City of New Orleans from without the State of Louisiana, or a mixed train containing cars either loaded or empty brought into the City of New Orleans from without the State of Louisiana, and cars loaded with freight moving entirely within the State of Louisiana, and on another trip a train made up of cars either empty or loaded with freight originating wholly within the State of Louisiana and moving to a point within said State.
>
> At the time of the collision which resulted in Behren's death, the train on which Behrens was working consisted of the said switch engine and thirteen cars loaded with sugar that originated in the State of Louisiana and were destined to another point within the State of Louisiana, namely Chalmette, Louisiana. At Chalmette, said switching engine and crew were to take up other cars, either loaded or empty, belonging to various railroad companies, and take them

to Harahan, Louisiana, and there turn them over to the yardmaster, who was to deliver them to various railroad systems to be transported to points within and without the State."

The question certified by the Court of Appeals is as follows:

"At the time of the injury resulting in the death of John Joseph Behrens, was he employed in interstate commerce within the meaning of the Employers' Liability Act, approved April 22, 1908?"

BRIEF.

The question in this case is not whether Congress has the power to pass an Employers' Liability Act, protecting all workmen whose efficiency might substantially affect interstate commerce. Congress has not enacted that in the case of workmen engaged a part of the time in interstate commerce, the employer shall be liable for all injuries received in the course of their employment, including both the time when they were engaged in interstate commerce and the time when they were not. That question must be entirely put aside, for Congress has imposed liability only while the employees are employed in interstate commerce. (*Act of April* 22, 1908, 35 *Stat. L.*, 65, *Chap.* 149, *Sec.* 1.) The phrase is:

> "That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, etc."

This case presents a crisp instance of where the engine and every car in the train were engaged in a movement which began and ended within the State of Louisiana and there was nothing in the train destined to a point outside the State. Here was a man who was part of the time engaged in interstate com-

merce and part of the time engaged in intrastate commerce, and his injury occurred while he was engaged in intrastate commerce.

It has been held under the *Safety Appliance Act of March* 2, 1893, 27 *Stat. L.*, 531, *c.* 196, a dining car bound interstate while being turned around preparatory to its being connected with an interstate train which was to draw it to destination, was subject to the provisions of the Act, or, to adopt the language of the Act, was a car "used in moving interstate traffic." *Johnson* v. *Southern Pac. Co.*, 196 U. S., 1 (1904). By this statute Congress was prescribing the character of appliances to be used in carrying on interstate traffic, and indeed might have prohibited altogether the use upon the line of the interstate carrier for any purpose of cars having appliances likely to affect injuriously the movement of interstate commerce or the safety of persons engaged therein, as was held in the case of *Southern Railway Company* v. *United States*, 222 U. S., 20 (1911). In the present case, however, Congress was engaged in regulating the relations between common carriers and their servants in the matter of liability for personal injuries, and the scope of Congressional power was limited to the sphere of interstate commerce. Unless the employee was engaged in such commerce, he does not fall within the provisions of the Act, or of the power of Congress to make a regulation in his favor. If the liberal interpretation should be adopted that any employee who is employed in interstate commerce part of the time is to be regarded as employed in such commerce all the time, the result might be to make

the Employers' Act of 1908 unconstitutional for the same reasons which invalidated the Employers' Liability Act of June 11, 1906, 34 Stat., 232, c. 3073, and which overthrew it in the *Employers' Liability Cases,* 207 U. S., 463 (1908).

It does not seem necessary to submit authority upon the proposition that since the engine and cars and their contents all had their origin and destination in the State of Louisiana, the transaction was wholly one of intrastate commerce.

In the case of *United States* v. *New York Cent. & H. R. R. Co.,* 205 Fed., 428, the District Court of the Western District of New York held May 26, 1913, that a train of empty freight cars transferred from one yard to another, a distance of four miles, two miles of which were over a through freight track, the transfer being made by switch engine, was not the case of a train engaged in interstate commerce, and the railroad company was not therefore liable for violating the Safety Appliance Act of March 2, 1893, (c. 196, 27 Stat., 531), for failure to have the air brakes connected.

At the hearing of the cause before District Judge Foster, *Behrens* v. *Illinois Cent. R. Co.,* 192 Fed., 581, 582 (1911), the court delivered the following opinion:

> "The evidence is undisputed that the plaintiff's intestate came to his death in an accident while he was employed as fireman on one of the defendant's engines. He was a member of a switching crew, and it was their duty to switch cars that had to move both in interstate and intrastate commerce indiscriminately. They usually reported for duty at Chalmette, a rail-

road terminal below the City of New Orleans, not on defendant's road, to make up a train of 'empties' and other cars intended for various destinations and going over its road, and also of empty cars to be returned to other roads. They would then haul this train to Harahan, a terminal above the City of New Orleans on the defendant's line—in fact, one of its yards—and then take out another train already made up for them and haul it back to Chalmette.

At the time the accident occurred the train being hauled was composed of 13 cars, all of which had originated in Louisiana destined to Chalmette, and, so far as the freight was concerned, constituted intrastate commerce. It is therefore contended by the defendant that, neither it nor its deceased employee was at the time engaged in interstate commerce, and there could be no recovery as against it in this action.

In my opinion the construction sought to be secured by the defendant is entirely too narrow and restricted. Undoubtedly the act of Congress is in derogation of the common law; but certainly the elimination of the doctrine of fellow servant and the modification of the doctrines of contributory negligence and assumed risk makes for the betterment of human rights as opposed to those of property, and I consider that, in the light of modern thought and opinion, the law should be as broadly and as liberally construed as possible.

In this view of the case, I consider that the usual and ordinary employment of the decedent in interstate commerce, mingled though it may be with employment in commerce which is wholly intrastate, fixes his status, and fixes the status of the railroad, and the mere fact that the accident occurred while he was engaged in work on an intrastate train, rather than a few minutes earlier or later, when he might have been engaged on an interstate train is immaterial. If he was engaged in two occupations

> that are so blended as to be inseparable and where the employee himself has no control over his own actions and cannot elect as to his employment, the court should not attempt to separate and distinguish between them."

This, however, of course abandons entirely the test of the character of the employment at the time of the injury, and substitutes therefor a doctrine of status, of which it is to be said that it is certainly not the one which Congress has fixed upon. Since the facts make it perfectly plain that Behrens was engaged in intrastate commerce at the time he was killed (indeed it would be difficult to conceive of a clearer case) aside from the constitutional question involved, the reason why the court should attempt to separate and distinguish between interstate and intrastate commerce is that Congress has made liability turn upon that distinction. "The light of modern thought and opinion" might well be directed to an efficient Workmen's Compensation Act instead of the present crude Employers' Liability Act. The particular defect in the statute, that it does not apply when the employee is engaged in intrastate commerce, is fundamental so far as the present act is concerned. A man is not "employed" in interstate commerce except when he is engaged in interstate commerce.

In the case of *Adair* v. *United States*, 208 U. S., 161 (1908), p. 177, the court stated that the decision in the Howard case was that Congress could regulate personal injuries received by employees while *actually* engaged in interstate commerce.

In the case of *Mondou* v. *New York, New Haven &*

Hartford Railroad Co., 223 U. S., 1 (1912), the constitutionality and validity of the present act is discussed in the following terms:

> "May Congress in the execution of its power over interstate commerce, regulate the relations of common carriers by railroad and their employes while both are engaged in such commerce."

At page 51, in delivering the opinion of the court, Mr. Justice Van Devanter says:

> "The present act unlike the one condemned in Employers' Liability Cases, 207 U. S., 463, deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce."

In the case of *Colasurdo* v. *Central R. R. of New Jersey*, 180 Fed., 832, 837, (1910), in the court of first instance, Judge Hand said:

> "Preliminarily the distinction should be noted that the act will not necessarily apply to the same person in all details of his employment. One man might have duties including both interstate and intrastate commerce and he would be subject to the act while engaged in one and not the other."

This was the case of a track walker who was run down by a train in the Jersey City yard of the defendant.

The act of 1906 was declared unconstitutional because it applied to employees engaged in intrastate commerce. *Employers' Liability Cases*, 207 U. S., 463 (1908). At page 498 the Chief Justice put the following case:

> "Take a railroad engaged in interstate commerce, having a purely local branch operated

> wholly within a State. Take again the same road having shops for repairs, and it may be for construction work, as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest besides the possibility of its being engaged in other independent enterprises. * * * Take a trolley line moving wholly within a State as to a large part of its business and yet as to the remainder crossing the state line."

In the dissenting opinion of Mr. Justice Harlan (with whom concurred Mr. Justice McKenna) at page 540, the opinion was expressed:

> "That the act, reasonably and properly interpreted, applies, and should be interpreted as intended by Congress to apply, only to cases of interstate commerce and to employees who, at the time of the particular wrong or injury complained of, are engaged in such commerce, and not to domestic commerce or commerce completely internal to the State in which the wrong or injury occurred."

It is obvious that a construction which would place an employee who is engaged in interstate commerce a part of the time in the same position as if he were employed in interstate commerce all the time, would bring the scope of the present act extremely close to that of the earlier one, and it is difficult to see how the second act would not become as unconstitutional as the first. How would it be if a man is engaged in intrastate commerce in the forenoon and interstate commerce in the afternoon? Is there any real difference between the case at bar and the case of a man employed in intrastate commerce one day and interstate commerce another day? Indeed, the moment we leave the distinction of the

actual operation in which the employee is engaged, we depart from our constitutional moorings.

In the case of *Pedersen* v. *Del. Lack. & West. R. R.*, 229 U. S., 146, 150 (1913), the court said:

> "Considering the terms of the statute, there can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employé is employed in interstate commerce," etc.

In the case of the *St. L. S. F. & T. Ry.* v. *Seale*, 229 U. S., 156 (1913), among the other questions involved was whether the employee who was killed was, at the time he received the injuries which caused his death, employed in interstate commerce. The court said, on page 158:

> "The real question, therefore, is whether the Federal Statute was applicable and this turns upon whether the injuries which caused the death of the deceased were sustained while the Company was engaged, and while he was employed by it, in interstate commerce. (Citing the *Pedersen case*, 229 U. S., 146, and the *Second Employers' Liability Cases*, 223 U. S., 1.)

In that case, the deceased was a yard clerk engaged in making a record of the numbers and initials on cars, and the like, and the court points out that the train which he was going to meet was engaged in the movement of interstate freight and that the interstate movement would not have been ended at the time of this inspection (161).

In the case of *Van Brimmer* v. *Texas & P. Ry. Co.*, 190 Fed., 394 (1911), in the Circuit Court for the Eastern District of Texas, the agreed facts were as follows:

"Plaintiff was a brakeman in the employ of the defendant company. On the occasion of his injuries he was engaged in the discharge of his duties as such brakeman on a freight train which was going from Big Springs, Texas, to El Paso, Texas. The train contained many cars, which were filled with merchandise from other states and were being so used to transport interstate shipments of freight. In the train was also a car filled with merchandise loaded at Dallas, Tex., and destined for Etholine, Tex.; the shipment being wholly intrastate in its character—that is, the shipment in the case of this car began and was to end within the state of Texas. When the train reached Etholine, the employés of the defendant, including the plaintiff, undertook to 'set out' the said car destined for that place. In performing this work the engine and several cars, including the one destined for Etholine, were cut loose from the train, which was left standing on the main line, and the plaintiff and his co-employés proceeded to put the Etholine car on a side track. The conductor of the train ordered the train crew to make a 'flying switch' and in this way send the car on the side track at Etholine. The part of this service which the plaintiff was to perform was to ride on the car, which was to be side tracked at Etholine, and while the train was in rapid motion to cut loose that car from the others. Immediately after this car was cut loose by the plaintiff, the engine and remaining cars were to be suddenly decreased in speed so as to produce the effect of sending the Etholine car upon one track at rapid speed, and then before the engine and balance of the cars could reach the switch it would be thrown by the switchman so as to send the engine and other cars upon another track. In attempting to perform the work in this manner, the engineer suddenly stopped his engine

before the Etholine car was cut loose, and the plaintiff was thereby jerked off that car, thrown to the ground and injured.

The negligence relied upon by the plaintiff was the act of the conductor in ordering the 'flying switch' and of the engineer in stopping the engine too suddenly."

In the course of its opinion, the court said (397):

"The plaintiff was a brakeman on a train of the defendant which contained cars being used for interstate shipments of freight. In the train was a car which was filled with merchandise destined for a point within the state. The shipment of this car originated in Texas, and was to end in that state. When the plaintiff was injured, he was engaged in the work of completing the transportation of that intrastate car. He, with the others, was doing the final work of landing that car at its destination and was doing no act toward furthering the interstate business of the railroad company. Neither the railroad company nor the plaintiff nor any of his fellow employés were, at that time, '*engaging* in commerce between any of the several states' but they were 'engaging' in the act in furtherance of the purely domestic and intrastate commerce of the defendant. That being so, the provisions of the act of Congress, known as the 'employer's liability act' do not apply, and Section 6 of that act, as amended, does not prohibit the removal of this case."

The court also says (397):

"As to whether a cause of action for an injury to an employé arises under the employer's liability act, depends upon the circumstances existing at the time of the injury. If at the time of the injury, the employé was performing some service for the company in furtherance of its interstate commerce business, then the rules of law declared in the act of 1908, and its amend-

> ment, will apply. Upon the other hand, if the employé when injured, is engaged wholly in the performance of a service in furtherance of the intrastate business of the railroad company, then the act of Congress does not apply, because to give it application in such case would be extending the power of the federal government over matters exclusively within the state jurisdiction and control."

In the case of *Bennett* v. *Lehigh Valley R. Co.*, 197 Fed., 578 (1912), an employee was killed in a collision while riding to his home by permission on one of his employer's trains. In his opinion, District Judge McPherson said:

> "At the time of the fatal collision he was not actually employed in interstate commerce, and it does not even appear that he had just previously been so employed, and was returning to his home. While it is true that he was not a passenger on the coal train, but was still an employé and was permissively there, I am unable to see on what ground he can be regarded as then engaged in interstate commerce. And, if he was not so engaged, he was not protected by the act of Congress."

In the case of *Meyers* v. *Norfolk & W. Ry. Co.*, ... N. C. ....., s. c. 78 S. E. Reporter, 280 (N. C., May 22, 1913), the plaintiff, who was a track man employed in repairing the roadbed, was in camp on Sunday. The assistant foreman ordered him to catch a passing freight train to go to another station for the mail for the camp. In attempting to board the train he fell under it and was injured. The court held that the plaintiff was not engaged in interstate commerce at the time of his injury, and therefore could not recover under the statute.

Obviously, if the plaintiff had acquired, so to speak, a "status" of employment in interstate commerce, the decision ought to have been different. Apparently under the ruling in the Pederson case (229 U. S., 146), he was engaged in interstate commerce six days in the week, but it so happened that when he was injured he was not engaged in any kind of commerce, although he was acting as an employe of the company. For the purposes of the present statute how can there be any difference between the case where an employee is at the time of his injury engaged solely in intrastate commerce, and the case when he is not engaged in commerce of any kind?

In the case of *Wright* v. *C. R. I. & P. R. Co.* decided by the Supreme Court of Nebraska, September 26, 1913, ... Neb. .....; s. c. 143 N. W. 220, the deceased was an engineer in the regular service of the defendant, and must have been constantly engaged in interstate commerce; but at the time of his injury he was ordered to run an engine as an "extra" from Fairbury to Albright, both points in Nebraska. The following quotation is made from the opinion of the court, delivered by Fawcett, J.:

> "The thirteenth assignment is that the court erred in submitting the case under the Employer's Liability Act. The contention under this assignment is that engine 1486 was on its way from Fairbury to Council Bluffs, Iowa, and hence Wright 'was engaged in interstate commerce.' It is probably true that, if Mr. Wright was engaged in interstate commerce at the time he was killed, the remedy would be under the federal act exclusively; but the trouble with this contention is neither Mr.

Wright nor engine 1486 was at the time engaged in interstate commerce. His order was to take this engine from Fairbury, in Nebraska, to Albright, Nebraska. He was running the engine without cars or train of any sort. The engine so far as we can gather from the record, was defective, and was on its way to the car shops for repairs. In *Chicago & N. W. R. Co.* v. *United States*, 168 Fed., 236, 93 C. C. A., 450, 21 L. R. A. (N. S.), 690, the Circuit Court of Appeals for this circuit held: 'The necessary movement of a defective empty car alone, for the purpose of repair only, and not in connection with any cars commercially used, does not subject the carrier to the penalties of the acts.' A similar holding was made by the same court in *United States* v. *Rio Grande W. R. Co.*, 174 Fed., 399, 98 C. C. A., 293. The same rule will, of course, apply to an engine."

In the case of *Gray* v. *Chicago & N. W. Ry. Co.* ..... Wis. ....., s. c. 142 N. W. 505, decided May 31, 1913, a hostler in a railroad yard was struck by an engine. His duties were confined to the care of the engines before and after they were in actual use for the purpose of commerce. The court held that there was no evidence to show that he was engaged in interstate commerce at the time of his injury, and therefore he could not recover. The following extract is made from the opinion of the court by Winslow, Chief Justice:

"We think there is a stronger ground, however, upon which the ruling of the trial court may be sustained. It appears that the plaintiff, at the time of the accident here, was walking back to his rest shanty, and was doing nothing at all in the way of dispatching engines. Now it may perhaps be correctly held (though we do not decide the question) that a man

whose day is spent in dispatching engines, all of which are engaged in interstate commerce, is in legal effect employed in interstate commerce during the whole day, and including the periods of leisure or rest when he is doing nothing but waiting for the arrival of an engine; but if, on the other hand, part of the engines dispatched be engaged in interstate business and part in local or intrastate business, we are unable to see how it could be logically said that he was 'employed in interstate commerce' all day, or during his intervals of leisure. In the present case, as we have seen, there was no offer to show that all the engines dispatched daily by the plaintiff were engaged in interstate commerce. As said before in this opinion, we think it must be considered a matter of common knowledge that the great railroad systems of the present day are engaged in both interstate and intrastate commerce all the time and side by side. The offer of proof in this case went little, if any, further than this. It was noticeably guarded and indefinite in its purport; every word of it might be admitted to be true, and yet it would not be shown that all the engines dispatched at this round house by the plaintiff were engaged in interstate business, nor even that the engine in question had been so engaged. The offer should have been so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish the fact that the plaintiff's entire work consisted of the dispatching of engines engaged in interstate commerce. Error must appear affirmatively; it is not to be presumed. We conclude, therefore, that there was no error in these rulings."

It will be manifest from this extract that in the opinion of the court, if the particular engines upon which the plaintiff was employed at the time of his injury were engaged in intrastate commerce only,

he could not have recovered under the Federal Employer's Liability Act.

In the case of the *Louisville & N. R. Co.* v. *Strange's Adm'x*, 161 S. W., 239, 244, decided by the Court of Appeals of Kentucky, December 16, 1913, the following extract is made from the opinion of the court:

> "What are the facts in this case? The train on which the decedent was working consisted of 19 cars. The majority of those cars were brought from points in Kentucky to Russellville. A few of the cars were brought from points in Tennessee. The conductor was directed to bring all of the cars to Russelville. No one had orders to carry the cars any further. When the cars coming from Tennessee reached Russellville, it was the end of their interstate journey. After reaching their destination, new orders were issued with reference to their destination. Under these new orders and on their new journey, each car in the train was destined to a point within the State of Kentucky. It is apparent therefore that the carrier was not engaged, nor was the decedent employed, in interstate commerce at the time of the injuries resulting in his death. It follows therefore that the trial court properly held that the case was one arising under the state law, and not under the federal statute."

In view of the changed conditions of American life since the Constitution was adopted, the distinction between interstate commerce and intrastate commerce may now be, as has been said of loving, "mere folly," but this cannot justify the courts in disregarding a distinction established by the Constitution and by the statute creating the cause of

action. We must wear our old clothes at least until we get our new ones.

BLEWETT LEE,
Counsel for Plaintiff in Error.

HUNTER C. LEAKE,
GUSTAVE LEMLE,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 241.

ILLINOIS CENTRAL RAILROAD COMPANY

vs.

JOSEPH BEHRENS, ADMINISTRATOR OF THE SUCCESSION OF JOSEPH JOHN BEHRENS.

BRIEF
IN SUPPORT OF THE PLAINTIFF IN ERROR.

ALFRED L. BECKER,
as amicus curiae, counsel for
THE NEW YORK CENTRAL &
HUDSON RIVER R. R. CO.

MAURICE C. SPRATT,

LESTER F. GILBERT,
Of Counsel.

PRESS OF "THE BUFFALO COMMERCIAL."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 241.

ILLINOIS CENTRAL RAILROAD COMPANY

vs.

JOSEPH BEHRENS, ADMINISTRATOR OF THE SUCCESSION OF JOSEPH JOHN BEHRENS.

BRIEF

IN SUPPORT OF THE PLAINTIFF IN ERROR, SUBMITTED BY ALFRED L. BECKER, AS AMICUS CURIAE, IN BEHALF OF THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

It seems to be a conceded fact that at the moment when the deceased was injured he was

engaged in intrastate commerce. This case, therefore, presents the question whether the Federal Employers' Liability Act should be so construed as to apply under any circumstances where both the carrier and its employee were at the time and place of the accident engaged in intrastate commerce.

This court held in *Southern Railway Company vs. United States*, 222 U. S., 20, (1911) that the power to regulate commerce among the states is not exceeded by that provision of the Safety Appliance Act which prohibits the use upon the railroad of any interstate carrier of any car not equipped with the safety appliances required by the Act. On an appeal involving solely the constitutionality of the act—not its construction—the railway company contended that Congress had no power to legislate with respect to the equipment of cars used in intrastate commerce on the line of an interstate carrier. The Supreme Court held, however, that the effective regulation of interstate commerce with respect to safety appliances required as an incident the regulation of the equipment of all cars in use on the interstate railroad. The court pointed out that an accident to an intrastate train due to lack of safety appliances would have a tendency to affect interstate traffic, and sustained the constitutionality of the act upon such ground. The principle applied was, that where a power conferred upon Congress cannot

be effectively exercised without an incidental regulation of matters which would otherwise fall within the reserved powers of the States, such incidental regulation is constitutional.

On the other hand, this Court held in the *Employers' Liability Cases*, 207 U. S., 463 (1908) that the power to regulate commerce was exceeded by an act which attempted to establish the liability of interstate carriers to all of their employees, whether or not engaged in interstate commerce at the time of the accident giving rise to the cause of action. The Supreme Court held that the power to establish the liability of an interstate carrier to its employees, while both were engaged in interstate commerce, had been conferred upon Congress, but that the effective exercise of such power did not require as an incident thereto the regulation of the liability of an interstate carrier towards its employees, while not engaged in interstate commerce.

The opposite results reached in the two cases must be ascribed to a basic difference between the essential characters of the two acts. The Safety Appliance Act is a regulation of the conduct of the carrier's business. An employers' liability act is merely an establishment of the rules of law governing the liabilities of employers to their employees.

The Safety Appliance Act, like the act requiring carriers to report to the Interstate Commerce Commission the earnings of not only their interstate, but also their intrastate business, (*Inter-*

state Commerce Commission vs. Goodrich Transit Co., 224 U. S., 194), is constitutional, because any effective regulation of these matters cannot be split up into two parts, one exclusively administered by the Federal authorities and one exclusively administered by the State authorities. The possibilities of conflicting regulations as to the patterns of couplers, height of draw-bars, and the forms of air brakes to be used, demand uniform regulation of all the operations of any carrier, whose railroad as a whole is an interstate railroad or one engaged in interstate commerce. But the effective regulation of liability does not require that all operations of an interstate railroad whether or not such operations be of an interstate character, shall be conducted subject to one rule of liability. That it does not was implicitly held in the (first) *Employers' Liability Cases*, 207 U. S., 463.

And in any event, even if Congress has the power to determine that the effective regulation of liability to employees engaged in interstate commerce requires the incidental regulation of liability to employees engaged in intrastate commerce where the usual employment of such servants is in interstate commerce, or an injury to one of them would tend to impede interstate commerce, Congress has not exercised such power. Congress has made the applicability of the Act depend upon whether the employee was actually employed in interstate commerce at the time of his injury—not upon whether he was usually so engaged, or upon

whether an injury to him would impede interstate commerce.

An intention to assume the regulation of intrastate commerce as an incident to the regulation of interstate commerce is not to be inferred in the absence of language clearly expressing such intention (*Minnesota Rate Cases*, 230 U. S., 352).

Once we dismiss the idea that Congress may, or has even attempted to, regulate the liability of interstate carriers to their employees engaged in intrastate commerce, as an incident to the regulataion of such liability to their employees engaged in interstate commerce, we find no reason for stopping short of holding that whether or not the Federal law governs in any particular instance depends upon whether the employee and the carrier were actually engaged in interstate commerce at the particular moment of the accident claimed to give a cause of action.

The existence or non-existence of liability under some statute or rule of the common law is frequently determined by the precise relations existing between the parties at the instant of the accident. In many classes of cases the courts make rather fine distinctions between the relations which may exist at one hour, and those which may exist an hour later; between those which usually exist, and those which may exist under circumstances slightly and yet vitally changed.

For example, though a servant be in the general employ of one master, if his services are temporarily loaned to another, no matter for how brief a time, no matter how exceptional the occur-

rence, the rules of liability may be fundamentally different.

Standard Oil Co., vs. Anderson, 212 U. S., 215.

Again, the workmens' compensation acts usually provide for a recovery where the employee is injured or killed in an accident "arising out of or in the course of his employment."* The solution of the question whether a particular accident falls within this category has never been made to depend upon the usual employment of the servant, or the indirect effect of the disability of the servant upon the master's service. On the contrary it has been held that if the servant departed only for a moment from the performance of his service he ceased to be entitled to the benefits of the statute. Thus in *Reed vs. Great Western Ry. Co.* [1909] A. C., 31, the House of Lords held that a locomotive engineer who momentarily left his engine, went across the tracks to procure a book for his private use, and was struck by a moving car while returning to his engine, was not entitled to compensation under the English Act.

Why do not similar departures from interstate commerce for the purpose of engaging in intrastate commerce fall outside of the scope of the Federal Act, even though they be temporary and

*Compare the very similar language of the Federal Employers' Liability Act: "While he is employed by such carrier in such commerce."

unusual? Where the line between interstate and intrastate commerce can be drawn with logical exactness, what excuse is there for either the Federal or the State law overstepping the line?

It has been argued that since an accident to an employee usually engaged in interstate commerce will have a tendency to impede such commerce, he should be held to be entitled to the benefits of the Federal Act even though temporarily engaged in intrastate commerce at the time of his injury.

See *Carr vs. New York Central & H. R. R. Co.*, 77 Misc. (N. Y.), 346, at page 354.

This argument erroneously assumes that the effect of the accident governs the applicability of the Act; whereas it is the character of the activity in which the employee was engaged at the time of the accident which governs. Unless the employee was engaged in interstate commerce at the time of the accident, it matters not at all how much an injury to him may affect interstate commerce. The death of a train dispatcher while seated at his breakfast table might tie up an interstate railroad for a time; but this would not qualify the eating of his breakfast as an act in interstate commerce. Furthermore, the argument misconceives the true nature of the federal statute. It fails to recognize the distinction between a regulation of the conduct of a carrier's business, like the Safety Appliance Act, and a regulation of a carrier's liability. The former some-

times must overlap intrastate commerce to be effective; the latter need not; and necessity is the test of power of Congress incidentally to regulate intrastate commerce.

In determining the meaning of the present Employers' Liability Act, we are not to assume that it was passed in order to promote the safety and dispatch of interstate commerce; for at most that was only a remote consideration. That the Act might have such a consequence was perhaps of importance in determining whether any act establishing rules of liability could be sustained under the power to *regulate* commerce. (*Mondou vs. New York, New Haven & Hartford Railroad Co.*, 223 U. S., 1). But without doubt the chief purpose of the act was to remedy what the people have come to consider a social injustice worked by the common law rules of negligence in master and servant cases. And one of the chief motives in the mind of Congress was to obviate all questions of constitutionality—to keep within undebatable territory of constitutional power.

If it were necessary for Congress to regulate incidentally some portion of intrastate commerce in order to accomplish the purpose of the Act, Congress doubtless might do so. However, this purpose can be fully accomplished and the terms of the Act fully satisfied without overstepping one inch the logical line of demarcation between interstate and intrastate commerce. To hold otherwise for the sake of a supposedly desirable

and convenient uniformity of legal remedies, or because this Court may distrust the inclination or wisdom of the state legislatures, would be to violate the principle well stated by Mr. Justice Hughes in the *Minnesota Rate Cases,* (230 U. S., 352):

> "It is the function of this Court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon."

Furthermore, the (first) *Employers' Liability Cases* distinctly held that the former act was unconstitutional if it applied to traffic conducted wholly within the State, though by an interstate carrier. This was the opinion of the whole Court (207 U. S., at page 509). The present act was drafted to meet this objection. It "deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce" (*Second Employers' Liability Cases,* 223 U. S., at page 51). What ground is there, then, for holding that Congress intended to repeat, less extensively or at all, the same infringement on the powers of the states which this Court had condemned? And if the act be construed as applying under any circumstances to employees while not engaged in interstate commerce, how, consis-

tently with the (first) Employers' Liability Cases, can it possibly be upheld as constitutional?

The judgment should be reversed.

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Of Counsel.

SUBJECT INDEX.

LIST OF CASES CITED.

SUBJECT INDEX—Continued.

Supreme Court of the United States

October Term, 1913.

No. 241.

ILLINOIS CENTRAL RAILROAD COMPANY

versus

JOSEPH BEHRENS, ADMINISTRATOR OF THE SUCCESSION OF JOSEPH JOHN BEHRENS.

On a Certificate from the United States Circuit Court of Appeals for the Fifth Circuit.

Brief for Defendant.

STATEMENT OF CASE.

During the night of November 28th, 1909, there was a head-on collision between a train of the Illinois Central

Railroad Company, and a train of the New Orleans Terminal Company, in the lower section of the City of New Orleans.

Joseph John Behrens, the fireman on the engine of the Illinois Central Railroad Company train, and in the employ of the said Illinois Central Railroad Company, lost his life in said collision.

Joseph Behrens, his father, qualified as administrator of the succession of the said deceased, and filed suit to recover damages sustained by the father and mother of the said Joseph John Behrens, and caused by the death of their son.

The petition was filed in the Circuit Court of the United States for the Eastern District of Louisiana, charging the negligence of the engineer operating said engine, and invoking the protection of the Employers' Liability Act of April 22nd, 1908. A judgment rendered in favor of the plaintiff on November 25th, 1911, in the sum of five thousand ($5000) dollars.

The railroad company prosecuted a writ of error from the Circuit Court of Appeals for the Fifth Circuit, and that Court has certified the question of law involved in the case as follows:

> **"Certificate From the United States Circuit Court of Appeals for the Fifth Circuit.**
>
> "This is an action at law based on the act of Congress of April 22nd, 1908, known as the Employers' Liability Act, brought by the defendant in error against the plaintiff in error for damages for the death of his son, John Joseph Behrens, alleged to have been caused by the negligence of the plaintiff in error.

"There was an answer denying the averments of the petition, and the following are the facts proved and shown by the record, which are material to the question here certified.

"John Joseph Behrens was killed in a head-on collision between trains of the Illinois Central Railroad and of the New Orleans Terminal Companies during the night of November 28th, 1909, in the City of New Orleans, State of Louisiana.

"The deceased was at the time of his death in the employ of the Illinois Central Railroad Company as a fireman, and was one of a crew attached to a switch engine that operated exclusively within the City of New Orleans, State of Louisiana.

"The general employment of said switching crew using said engine was to handle over the company's tracks and other tracks in the said City of New Orleans both intrastate and interstate commerce indiscriminately; that is, they might on one trip handle cars that were brought into the City of New Orleans from without the State of Louisiana, or a mixed train containing cars either loaded or empty brought into the City of New Orleans from without the State of Louisiana, and cars loaded with freight moving entirely within the State of Louisiana, and on another trip a train made up of cars either empty or loaded with freight originating wholly within the State of Louisiana and moving to a point within said State.

"At the time of the collision which resulted in Behrens' death, the train on which Behrens was working consisted of the said switch engine and thirteen cars loaded with sugar that originated in the State of Louisiana and were destined to another point within the State of Lou-

isiana, namely, Chalmette, Louisiana. At Chalmette said switching engine and crew were to take up other cars, either loaded or empty, belonging to various railroad companies, and take them to Harahan, Louisiana, and there turn them over to the yardmaster, who was to deliver them to various railroad systems to be transported to points within and without the State.

"The case has been fully argued and submitted to this Court.

"This Court desires the instruction of the Supreme Court of the United States for the proper decision of a proposition or question of law, and it therefore certifies to the Supreme Court the following question:

"(1) At the time of the injury resulting in the death of John Joseph Behrens, was he employed in interstate commerce within the meaning of the Employers' Liability Act, approved April 22, 1908?

"For further certainty and information a printed copy of the transcript is transmitted with this certificate."

FACTS STATED IN CERTIFICATE.

As stated in the certificate from the Circuit Court of Appeals, the deceased, at the time of his injury, was a fireman in the employ of the Illinois Central Railroad Company, and was a member of a crew charged with the operation of a certain switch engine belonging to said railroad company, and used by it to transfer, from one section to another, and from one track to another, in

the City of New Orleans, all the trains used and operated by said company in its general railroad business, **whether passenger or freight, loaded or empty, intrastate or interstate, indiscriminately.**

At the exact moment of the collision which brought about Behrens' death, the switch engine on which he was working, was actually drawing thirteen cars, loaded with sugar, that originated in the State of Louisiana, and were destined to another point, at Chalmette, below the City of New Orleans, and also within the State of Louisiana.

But at Chalmette, **"said switching engine and crew were to take up other cars, either loaded or empty, belonging to various railroad companies, and take them to Harahan, in Louisiana, and there turn them over to the yardmaster, who was to deliver them to various railroad systems to be transported to points within and without the State."**

Printed Certificate, 1-2.

RAILROAD COMPANY'S CONTENTION.

The railroad company contends that the status of Behrens as an employee must be fixed by the nature of the **work** he was actually performing at the exact time of the accident, and that said **work** consisted only in the hauling of thirteen cars of strictly local freight. Hence, under that view, Behrens was handling intrastate freight only, and the question certified should be answered in the negative.

ADMINISTRATOR'S CONTENTION.

The administrator, on the other hand, contends:

First. That the general nature of Behrens' employment, and not any specific, isolated item of work, must fix his status as an employee.

Second. That the actual **work** of hauling thirteen cars of local freight was not the only **work** Behrens was doing, and was not the true and full measure of his **employment** at the time of his injury.

Third. That, even if there had been no cars at all attached to the engine, at the time of the injury, the mere fact that said switch engine was destined to Chalmette, where "**said switching engine and crew were to take up other cars, either loaded or empty, belonging to various railroad companies, and take them to Harahan, Louisiana, and there turn them over to the yardmaster, who was to deliver them to various railroad systems to be tansported to points within and without the State,**" rendered the fatal trip of said engine, a necessary step in the interstate traffic of the railroad company, and constituted said engine itself an instrument of said traffic, without which said interstate commerce could not have been carried on.

Should these contentions prevail, the question certified must be answered in the affirmative.

CONSTRUCTION OF STATUTE.

To sustain the contention of the railroad company, it would be necessary, not only to place an extremely narrow construction on the Employers' Liability Act, but to overlook some of the controlling facts of the case. On the first proposition this Honorable Court has repeatedly expressed itself in no uncertain terms, while construing this and similar statutes. On the second proposition, the lower Court has found the facts and set them forth clearly in the certificate. Under both tests the contention of the company is untenable.

AUTHORITIES.

Bearing in mind the object of this humane legislation, and realizing that its purpose was to extend protection, in cases of personal injuries, to a large number of railroad employees who, otherwise, were without redress, the Circuit Court of Appeals for the Eighth Circuit, expressed itself as follows:

> "The statute is remedial in its character, and it should be so construed as to prevent the mischief and advance the remedy."
>
> **Railway Co. v. Conley, 187 Fed. 951.**

In **Michigan Central Railroad Company v. Vreeland, 227 U. S. 65**, this Court, in discussing another phase of the same act, recently said:

> "The Employers' Liability Act of 1908 will not receive such a narrow interpretation as to defeat

all liability because the injured employee survived the injury for a brief period."

In **Johnson v. Southern Pacific Company, 196 U. S. 21,** while construing the Safety Appliance Acts, in relation to interstate traffic, this Court said, through Chief Justice Fuller:

> "If the language used were open to construction, we are constrained to say that the construction put upon the act by the Circuit Court of Appeals was altogether too narrow.
>
> "This strictness was thought to be required because the common law rule as to the assumption of risk was changed by the act, and because the act was penal.
>
> "The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law, and as there is no doubt of that intention here, the extent of the application of the change demands at least no more rigorous construction than would be applied to penal laws. And, as Chief Justice Parker remarked, conceding that statutes in derogation of the common law are to be construed strictly, **'they are also to be construed sensibly, and with a view to the object aimed at by the Legislature.'** "
>
> **Gibson v. Jenney, 15 Massachusetts, 205.**

Then, this Court added:

> "Another ground on which the decision of the Circuit Court of Appeals was rested remains to be noticed. That Court held by a majority that, as the dining-car was empty and had not actually

entered upon its trip, it was not used in moving interstate traffic, and, hence, was not within the act. The dining-car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the eastbound train was so late that it was found that the car could not reach Ogden in time to return on the next westbound train, according to intention, and it was therefore dropped off at Promontory to be picked up by that train as it came along that evening.

"The presumption is that it was stocked for the return, and, as it was not a new car, or a car just from the repair shop, on its way to its field of labor, it was not 'an empty,' as that term is sometimes used. Besides, whether cars are empty or loaded, the danger to employees is practically the same, and we agree with the observation of District Judge Shiras in **Voelker v. Railway Company, 116 Fed. Rep. 867, that: 'It cannot be true that on the Eastern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty.'**

"Counsel urges that the character of the dining-car at the time and place of the injury was local only, and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use, and **Coe v. Errol, 116 U. S. 517,** is cited as supporting the contention. In **Coe v. Errol** it was held that certain logs cut in New Hampshire and hauled to a river in order that they might be transported to Maine, were subjected to taxation in the former State before transportation had begun.

> "The distinction between merchandise which may become an article of interstate commerce, or may not. and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different States, renders this and like cases inapplicable.
>
> "Confessedly this dining-car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

In **Schlemmer v. Railroad Company, 205 U. S. 10,** while construing the Safety Appliance Act of 1893, this Court used this language:

> "Tested by context, subject-matter and object, 'any car' meant all kinds of cars running on the rails, including locomotives. The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars.
>
> "These considerations apply to shovel cars as well as to locomotives, **and show that the words 'used in moving interstate traffic' should not be taken in a narrow sense."**

In **United States v. Railroad Company, 189 Fed. 964,** the Court said:

> "The Safety Appliance Act, and the Hours of Service Act of March 4th, 1907, should be liberally construed."

In **Railway Company v. United States, 231 U. S. 119,** this Court, in discussing the Hours of Service Act, and the construction to be placed thereon, said:

> "One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period, and that if it be deducted, they were not kept more than sixteen hours.
>
> **"But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait."**

It is well to note that the statute extends relief for damages "to any person suffering injury while he is **employed** by such carrier in such commerce." Nowhere in the act can any clause or expression be found that would indicate the intent of Congress to limit the right of recovery to any particular or special kind of work, or to any fixed time. On the contrary, the act refers to **employment,** and not to any particular **work.** As a matter of fact, when this act was before Congress, the amendment was offered by the minority of the Judiciary Committee, to add the words "in service directly connected with the operation of the road," and the amendment was rejected.

See White, Personal Injuries on Railroads, Vol. 1, page 817.

So that in the light of its history, of its phraseology, and of the final interpretation given similar legislation, we feel confident that the Employers' Liability Act of

1908 will also be "sensibly and liberally construed," and that no narrow interpretation will be permitted to stifle or paralyze its benevolent purpose.

With the broad and liberal interpretation of the law being assured, it follows that the contention of the railroad company, that the actual **work** being performed at the moment of the injury fixes the status of the employee under the act, cannot prevail. On the contrary, the general nature of the **employment**, and not any specific item of **work** done, must control and fix said status.

Besides the faulty construction of the law on which the railroad company's contention rests, its appreciation of the facts found in the case, is also too narrow and limited, and necessarily misleading.

The company contends that because the engine on which Behrens was working, at the time of his injury, was hauling thirteen cars loaded with local freight, he was necessarily engaged in intrastate traffic, and, therefore, beyond the protection of the Act of 1908.

We invite the Court's particular attention to the fact that the hauling of those thirteen cars of local freight from New Orleans to Chalmette, **was not the only work** in which Behrens was employed at the time of his injury. **That work was only a part of the employment for which Behrens was paid.**

That particular hauling was only a fractional part of the business in which the railroad company itself was interested during that particular trip, and in which both,

the company and Behrens, were participating at the time of the injury.

The discussion of the administrator's contentions will, we believe, more fully expose the fallacy of the company's claims.

ADMINISTRATOR'S CONTENTION.

First. That the general nature of Behrens' employment must fix his status as an employee, and not any specific, isolated item of work.

Second. That the actual work of hauling thirteen cars of local freight was not the only work Behrens was doing, and was not the true and full measure of his employment at the time of his injury.

Third. That, even if there had been no cars at all attached to the engine, the mere fact that said switch engine was destined to Chalmette, where "said switching engine and crew were to take up other cars, either loaded or empty, belonging to various railroad companies, and take them to Harahan, Louisiana, and there turn them over to the yardmaster, who was to deliver them to various railroad systems, to be transported to points within and without the State," rendered the fatal trip of said engine a necessary step in the interstate traffic of the railroad company, and constituted said engine itself an instrument of said traffic, without which said interstate commerce could not have been carried on.

FIRST.

It is admitted that Behrens was employed to do general switching work without regard to class or character of cars or commerce handled. In the words of the certificate, "the general employment of said switching crew using said engine was to handle over the company's tracks and other tracks in the City of New Orleans, **both intrastate and interstate commerce indiscriminately;** that is, they might on one trip handle cars that were brought into the City of New Orleans from without the State of Louisiana, or a mixed train, containing cars, either loaded or empty, brought into the City of New Orleans from without the State of Louisiana, and cars loaded with freight moving entirely within the State of Louisiana, and on another trip a train made up of cars, either empty or loaded, with freight originating wholly within the State of Louisiana and moving to a point within said State."

Let us remember that work of that character was being performed by Behrens and the crew to which he was attached, and the engine used for said work, regularly every night during the crew's tour of duty.

Now, either that work was intrastate or it was interstate, or it was both.

From the certificate and the unquestioned evidence, the most the company can claim is that it **was both, intrastate and interstate,** indiscriminately.

FROM THE VERY NATURE OF THE OCCUPATION IT IS IMPOSSIBLE FOR THE COMPANY TO

SEPARATE ONE LINE OF WORK FROM THE OTHER.

The services rendered by Behrens and his crew being so inseparably blended and intermingled in their intrastate and interstate aspects, that the company itself could not prescribe one mode of operation for one, without seriously affecting, delaying, hindering or interfering with the other, how can it be expected that the Courts will endeavor to segregate the one from the other, and to split up the services rendered by Behrens into various subdivisions lasting possibly only a few minutes each, during which the Federal Act would apply, followed by other intervals of labor where only the State law would control.

Would an employee who has handled interstate cars and interstate freight all night, during his tour of duty, and who would be protected by the Federal Act in the event of injury, be suddenly denied that protection, and be left without a remedy, if upon the last trip of his engine, there happened to be no interstate freight or interstate car in his train?

Would an employee who draws a train containing one or two cars loaded with interstate freight up to a switch at Poydras Street at 1 o'clock in the morning, meanwhile being clearly within the provisions of the Federal Act, be placed beyond the pale, and denied the protection of the act, on the other side of the switch the moment the two or three cars of interstate freight are dropped from the train?

Can it be reasonably held that the Federal Act would apply on one side of Poydras Street, up to 1 o'clock,

but that Congress lost its power on the other side of Poydras Street, after 1 o'clock in the morning, and during the same tour of duty?

In **Hanley v. Southern Railway Company, 187 U. S. 620,** in discussing the conflict between State and Federal authority in a matter of railroad rate regulation, this Court said:

> "No one contends that the regulation could be split up according to the jurisdiction of State or Territory over the track, or that both State and Territory may regulate the whole rate. There can be **but one rate, fixed by one authority, whether that authority be Arkansas or Congress.**" **Citing authorities.**

Reasoning by analogy, once it is conceded that the Federal Act protected the deceased, as long as there was an interstate car in the train drawn by the switch engine on which he was working, that protection covered him throughout his tour of duty, and the mere fact that at certain intervals the freight handled may have been entirely local, should not, or could not, divest the employee of the benefits of the Federal Act which covered him at the beginning of his tour of duty.

To hold otherwise, would make of an employee's legal status, with reference to protection and right of recovery in event of injury, a chameleon-like fiction, appearing now dark, then light, at one minute, unfavorable, and at the next favorable, continually changing in aspect during the hours of the night, kaleidescopic and confused throughout his tour of duty, depending upon the complexion of the freight handled and the exact time of

any particular occurrence, all of which is beyond the power of the employer to regulate, and entirely beyond the knowledge and control of the employee, whom Congress expressly desired to protect.

So that, in the words of the Chicago Judge, "if the law is common sense," then the rule of reason should apply to the relations between master and servant, as well as to other relations in worldly matters, and the nature of the employee's general employment, the larger aspect of his occupation, should fix his status, and not any specific, isolated item or particular piece of work.

If, then, that usual employment had an interstate element in it, or is so closely associated and connected with interstate commerce that it is essential or necessary to that commerce, that employment becomes naturally subject to interstate regulation and control, although at times it may also be in furtherance of intrastate service.

SECOND.

That the actual work of hauling thirteen cars of local freight was not the only work Behrens was doing, and was not the true and full measure of his employment at the time of his injury.

As stated before, the contention of the railroad company is based upon a twofold error, viz.:

First, upon a narrow and restricted interpretation of the law; and second, upon an incomplete and narrow view of the facts. The first proposition is, we think,

completely refuted by the adjudications of this and other Courts, and the second proposition is, we submit, completely met by reference to the facts certified to by the lower Court and conceded by the evidence.

The claims of the railroad company can only be justified on the theory that the work in which Behrens was employed at the time of his injury, was the hauling of thirteen cars of local freight. At this point the railroad company stops its analysis of the facts, and urges that the hauling of thirteen cars loaded with intrastate freight, constitutes intrastate traffic only, and, consequently, that the deceased was not within the provisions of the Federal Act at the time of the injury which resulted in his death.

But we again invite the Court's special attention to the facts found in the certificate, and abundantly established in the evidence, **that the hauling of the said thirteen cars of local freight, was not the only work which Behrens was doing at the time of his injury.**

In the general employment, in which Behrens and the railroad company were both engaged, it became necessary to transfer local freight from one track to another and to switch local cars from one point to another just as much as it was necessary to transfer and to switch interstate cars and interstate freight from one track to another track, or from one point to another point, in the City of New Orleans. **So that the taking up of cars loaded with local freight, and separating them from other cars, in the same train, or in other trains, and the transferring or switching of said cars loaded with local freight to other roads, tracks, switches, or stations, was,**

and is, as necessary and essential to the proper handling or disposition of the interstate freight, as the transfer or switching of the interstate cars themselves.

In other words, if the cars loaded with local or intrastate freight were not properly handled or switched by Behrens and his crew, the proper, prompt and efficient disposition of the interstate cars loaded with interstate freight, would have been seriously hindered, delayed or interfered with, if not stopped entirely.

It is manifest, therefore, that the services rendered by Behrens in switching and transferring the local freight and cars, were essential to the performance of the other services to be rendered by him in moving the interstate freight and cars. The business of the railroad company in the latter connection was absolutely impossible without Behrens' services in the former relation.

So that, we repeat, in hauling the thirteen cars of local freight at the time of his injury, Behrens was doing not only that particular piece of work, but he was, at the same time, separating and assorting the entire freight or commerce of the railroad company at this point so that its interstate business could be carried on as well as its strictly local business.

In the full view of the evidence, it is manifest that at the time of his injury Behrens and the railroad company were both engaged in the furtherance of an interstate service.

THIRD.

That, even if there had been no cars at all attached to the engine, the mere fact that said switch engine was destined to Chalmette, where "said switch engine and crew were to take up other cars, either loaded or empty, belonging to various railroad companies, and take them to Harahan, Louisiana, and there turn them over to the yardmaster, who was to deliver them to various railroad systems, to be transported to points within and without the State," rendered the fatal trip of said engine a necessary step in the interstate traffic of the railroad company, and constituted said engine itself an instrument of said traffic, without which said interstate commerce could not have been carried on.

It sems to us only necessary to obtain and ascertain the full and exact facts in order to establish the correctness of the administrator's contention, that Behrens, at the time of his injury, was engaged, as well as the railroad company, in some interstate activity. Let us quote from the certificate again:

> "At the time of the collision which resulted in Behrens' death, the train on which Behrens was working consisted of the said switch engine and thirteen cars loaded with sugar that originated in the State of Louisiana, and were destined to another point within the State of Louisiana; namely, Chalmette, Louisiana. **At Chalmette said switching engine and crew were to take up other cars, either loaded or empty, belonging to various railroad companies, and take them to Harahan, Louisiana, and there turn them over to the yard-**

master, who was to deliver them to various railroad systems to be transported to points within and without the State."

See Printed Certificate, 1-2.

Again, it is manifest from these facts that Behrens was not simply hauling thirteen cars of local freight from one point to another in the City of New Orleans, nor was he simply separating, disconnecting or transferring local freight cars from one point to another, in order that other cars containing interstate freight might also in due time be expeditiously, safely and properly handled, switched, or transferred, but while proceeding on the trip which terminated in his death, he was destined to Chalmette, "to take up other cars, either loaded or empty, belonging to various railroad companies, and take them to Harahan, Louisiana, and there turn them over to the yardmaster, who was to deliver them to various railroad systems, to be transported to points within and without the State."

So that, if the thirteen cars loaded with local freight had not been attached to the engine, and if the switch engine on which Behrens was stationed, had been proceeding alone towards Chalmette to do the work commanded and above referred to, Behrens then would still have been engaged in an interstate mission. **The fact that on that mission, while proceeding to join interstate cars which he was to take back on the return trip, there were attached to his engine certain local cars, does not destroy the interstate feature or nature of the trip on which he lost his life.**

The citation of recent decisions, involving similar matters, renders further argument or comment unnecessary.

AUTHORITIES.

In **Southern Railway v. United States, 222 U. S. 27,** this Court, in discussing the interstate features of the Safety Appliance Acts, took occasion to comment as follows:

> "Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen and like employees, for they usually, if not necessarily, have to do with both classes of traffice. Besides, **the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others.**"

And so it was with Behrens. The negligence which caused his death, not only affected the particular trip on which he was engaged, but affected the interstate service in which he was also employed.

And again the Court said:

> "Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic and the object which the act obviously are designed to attain, namely, the safety or interstate commerce and of those who are employed in its movement? Or, stating it in another way: Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary and completely may be exerted to secure the safety of the persons and property transported therein, and of those who are employed in such transportation, no matter what may be the source of the danger which threatens it. That is to say, it is no objection to such an exertion of this power that the dangers

intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce."

Southern Railway v. United States, 222 U. S. 26.

In **United States v. Railroad Company, 164 Fed. 347,** the Court held that the terms, "used in interstate traffic," do not require that a car be actually loaded with interstate traffic from State to State. And it was further observed that the meaning of such acts, within the regulating power of Congress, was that a car that had been used in interstate traffic, and was intended or ready to be so used, whenever needed, is within the meaning of the Safety Appliance Acts.

So, also, United States v. Louisville & Nashville, 162 Fed. 185.

United States v. Great Northern R. R., 145 Fed. 438.

United States v. Railroad Company, 154 Fed. 516.

It cannot be denied that Behrens, at the time of his injury, was still in the interstate service of the railroad company, although at the time of his injury he was actually connected with an intrastate train. **Still at that particular time, his employment as an interstate employee had not ceased. He was subject to orders, and could at any time have been directed to handle some interstate train. As a matter of fact, the certificate shows that he was on his way to join and take back an interstate train.** So that, if the negligence which caused his injury be considered as being strictly intrastate in its origin, Behrens was still within the provisions of the

Federal Act, as the cause of the injury, or the offending servant, need not be connected with interstate traffic.

In **Mondou v. Railroad Company, 223 U. S. 51,** this Court in passing upon the second Employers' Liability cases, said:

> "The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another, where all are engaged in interstate commerce, **that power does not embrace instances where the negligent employee is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power.** As was said in **Southern Railway Co. v. United States, 222 U. S. 20, 27,** that power is plenary and completely may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present act, unlike the one condemned in **Employers Liability Cases, 207 U. S. 463,** deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employes while engaged in such commerce. **And this being so, it is not a valid objection that the Act embraces instances were the causal negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein."**

In **Pedersen v. Railroad Company, 229 U. S. 146,** this Court said:

> "Under the Employers' Liability Act a right of recovery exists only where the injury is suffered while the carrier is engaged in interstate commerce, and while the employee is employed in such commerce; **but it is not essential that the co-employee causing the injury be also employed in such commerce."**

In **Lamphere v. Railroad & Navigation Company, 196 Fed. 336,** the Circuit Court of Appeals for the Ninth Circuit, said, and this decision has been quoted approvingly by the Supreme Court of the United States, in **Pedersen v. Railroad Company,** above cited:

> "As indicated in the opinion, the test question in determining whether a personal injury to an employee of a railroad company is within the purview of the act is: What is its effect upon interstate commerce? **Does not it have the effect to hinder, delay or interfere with such commerce!** As applied to the present case, it is this:
>
> "Was the relation of the employment of the deceased to interstate commerce such, that the personal injury to him tended to delay or hinder the movement of a train engaged in interstate commerce? To that question we think there can be but one answer.
>
> **"Under the imperative command of his employer, the deceased was on his way to relieve, in the capacity of a fireman, the crew of a train which was carrying interstate commerce, and the effect of his death was to hinder and delay the movement of that train. In our opinion the complaint states a cause of action under the Employers' Liability Act."**

So in the case at bar, the death of Behrens hindered and delayed the interstate train he was to join, and hindered and delayed all the interstate switching he was engaged in that night.

In **Zikos v. Oregon Railroad Company, 179 Fed. 893,** the record presented an action brought by plaintiff to recover damages for an injury received while employed by defendant as a section hand. The injury was caused by the breaking off of the head of a spike which plaintiff was driving into a tie in the course of repairing defendant's track. The track was used in both intrastate and interstate commerce. The Court held that the Federal Act was applicable, and said:

> "Where employees necessarily and directly contribute to the more extended use of, and without which, interstate traffic could not be carried on at all, no reason appears for denying the power over the one, although it may indirectly contribute to the other."

In **Colasurdo v. Central Railroad Co.**, 180 Fed. 832, and affirmed by the Circuit Court of Appeals, Second Circuit, **in 192 Fed. 901,** the plaintiff, a track-walker, was injured in the yards at Jersey City, New Jersey, by being run over by a train of cars which had come from Somerville, New Jersey, which had discharged its passengers, and was being kicked to a platform to take on a new load of passengers for the return trip to Somerville. The plaintiff was at the time of his injury holding a lamp to give light to another employee in repairing a switch. The Court held that the Federal Act applied.

In Railway Company v. Seale, 229 U. S. 156, we find the following:

> "The defendant was engaged in both intrastate and interstate commerce.
>
> "The deceased was employed by the defendant as a yard clerk in that yard, and his principal duties were those of examining incoming and outgoing trains and making a record of the numbers and initials on the cars, of inspecting and making a record of the seals on the car doors, of checking the cars with the conductor's lists, and of putting cards or labels on the cars to guide switching crews in breaking up incoming, and making up outgoing, trains.
>
> "**His duties related to both intrasate and interstate traffic, and at the time of his injury and death he was on his way through the yard to one of the tracks therein, to meet an incoming freight train from Madill, Oklahoma, composed of several cars, ten of which were loaded with freight. The purpose for which he was going to the train was that of taking the numbers of the cars and otherwise performing his duties in respect of them. While so engaged he was struck and fatally injured by a switch engine, which, it is claimed, was being negligently operated by other employees in the yard.**"

The Court further added:

> "**In our opinion the evidence does not admit of any other view than that the case made by it was within the Federal Statute. The train from Oklahoma was not only an interstate train, but was engaged in the movement of interstate freight, and the duty which the deceased was performing was connected with that movement, not indirectly**

or remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. **Whether they were going further or were to stop at that station, it still was necessary that the train be broken up, and the cars taken to the appropriate tracks for making up outgoing trains or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the State line."**

See McNeil v. Southern Railway Company, 202 U. S., 543.

Johnson v. Southern Pacific Company, 196 U. S. 21.

We find this syllabus:

"An employee whose duty is to take the numbers of, and seal up and label cars, some of which are engaged in interstate and some in intrastate traffic, is directly and not indirectly engaged in interstate commerce."

Railway Company v. Seale, 229 U. S. 156.

CASES CITED BY RAILROAD COMPANY.

In the lower Court, when this case was presented, the Railroad Company relied mainly upon the case of **Lamphere v. Railway and Navigation Company, 193 Fed. 248,** where it was held that a fireman injured by a fellow-employee, while on the way from his home to a certain station, where he was to assume duties on an interstate train, was not within the protection of the Federal Statute.

We call the Court's attention to the fact that the **Lamphere decision was reversed on appeal,** and that it was held by the Circuit Court of Appeals of the Ninth Circuit, that such a fireman was within the provisions of the act.

Lamphere v. Railway and Navigation Company, 196 Fed. 336.

The railroad company also mainly relied below on the **case of Pedersen v. Railroad Company, referred to in 184 Fed. 738.**

We invite this Court's attention to the fact that the **Pedersen case was finally presented to the Supreme Court of the United States, where the lower decisions were reversed, and it was held that the Federal Act did apply.**

In **Pedersen v. Railroad Company, 229 U. S. 146,** the plaintiff at the time of his injury was engaged in building an additional track, part of which was to be laid on a bridge. He was struck by a local train, carrying material from one part of the track to another. This track was intended for use both in local and interstate commerce.

In passing upon that case, this Court said:

> "**True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used, it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce.**

> "The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place, where that work was to be done, some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

So in the instant case, the switch engine on which Behrens was stationed was used indiscriminately in intrastate and interstate commerce, and on the fatal trip was destined to join and take back an interstate train. **That engine, so used, was necessarily an instrument essential to the interstate business of the railroad company.**

In **Railway Company v. Earnest, 229 U. S. 114,** a switchman, walking in the railroad yards, in advance of, and piloting an engine which was to join an interstate train, was held, without discussion or question, to have been employed in interstate traffic, and necessarily protected under the Employers' Liability Act.

In **Railroad Company v. Darr, 204 Fed., 751,** the Circuit Court of Appeals for the Second Circuit, held that a workman in the railroad yard repairing a bolt on an engine which had been taken off the main line, but

usually used in interstate commerce, was within the provisions of the act.

In **Illinois Central Railroad Company v. Nelson, 203 Fed. 956,** the Circuit Court of Appeals for the Eighth Circuit, held that a brakeman crossing tracks in the railroad yards, and injured while carrying ice on the way to an interstate train on which he was employed, was engaged in interstate traffic, and was protected by the act.

CONCLUSION.

In view of the principles recognized in the foregoing decisions, and in the face of the facts recited in the certificate from the lower Court, in the case at bar, we are driven to the conclusion, that, at the time of his injury, Behrens was engaged in interstate commerce, and that while hauling a local train by means of a switch engine usually used in interstate switching, he was on his way, under orders, to join an interstate train, which he was, with the other members of the crew and with the same switching engine, to take back to a certain junction point where said train was **"to be delivered to various railroad systems to be transported to points within and without the State."**

Under the law and the facts it seems to us that John Joseph Behrens, at the time of his injury, was employed in interstate commerce within the meaning of the Employers' Liability Act of April 22, 1908.

The question certified by the Honorable the Circuit Court of Appeals for the Fifth Circuit, should, therefore, be answered in the affirmative.

Respectfully submitted,

ARMAND ROMAIN,

Attorney for Joseph Behrens, Administrator of the Succession of John Joseph Behrens.

New Orleans, February, 1914.

ILLINOIS CENTRAL RAILROAD COMPANY v. BEHRENS, ADMINISTRATOR.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 241. Argued March 6, 1914.—Decided April 27, 1914.

When a railroad is a highway for both interstate and intrastate commerce, and the two classes of traffic are interdependent in point of both movement and safety, Congress may, under the power committed to it by the commerce clause of the Constitution, regulate the liability of the carrier for injuries suffered by an employé engaged in general work pertaining to both classes of commerce, whether the particular service performed at the time, isolatedly considered, is in interstate or intrastate commerce. *Employers' Liability Cases*, 207 U. S. 463, distinguished.

Notwithstanding its wider powers, Congress, in enacting the Federal Employers' Liability Act of 1908, has confined the liability imposed by that act to injuries occurring to employés when the particular service in which they are employed at the time of injury is a part of interstate commerce. *Pedersen* v. *Del., Lac. & West. R. R. Co.*, 229 U. S. 146.

An employé of a carrier in interstate commerce by railroad who is engaged on a switch engine in moving several cars all loaded with intrastate freight from one point in a city to another point in the same city is not engaged in interstate commerce and an injury then sustained is not within the Employers' Liability Act of 1908.

The fact that an employé engaged in intrastate service expects, upon completion of that task, to engage in another which is a part of interstate commerce, is immaterial under the Employers' Liability Act of 1908 and will not bring the action under that act.

THE facts, which involve the construction of the Federal Employers' Liability Act of 1908 and the determination of whether an injured employé was engaged in interstate commerce at the time of the injury, are stated in the opinion.

Mr. Blewett Lee, with whom *Mr. Hunter C. Leake* and *Mr. Gustave Lemle* were on the brief, for the Illinois Central Railroad Company.

Mr. Armand Romain for Behrens, Administrator:

The railroad company contends that the status of the employé must be fixed by the nature of the work he was actually performing at the exact time of the accident, and that if said work consisted only in the hauling of cars of strictly local freight, the question certified should be answered in the negative.

The administrator, on the other hand, contends that the question certified must be answered in the affirmative, because:

The general nature of the employment, and not any specific, isolated item of work, must fix the status of an employé.

The actual work of hauling cars of local freight was not the only work the employé was doing, and was not the true and full measure of his employment at the time of his injury.

Even if there had been no cars at all attached to the engine, at the time of the injury, the mere fact that said switch engine was destined to Chalmette, where the switching engine and crew were to take up other cars, either loaded or empty, belonging to various railroad companies, and take them to a point in the same State, and there turn them over to the yardmaster, who was to deliver them to various railroad systems to be transported to points within and without the State, rendered the fatal trip of said engine a necessary step in the interstate traffic of the railroad company and constituted the engine itself an instrument of said traffic, without which such interstate commerce could not have been carried on.

To sustain the contention of the railroad company, it would be necessary, not only to place an extremely narrow construction on the Employers' Liability Act, but to over-

look some of the controlling facts of the case. On the first proposition this court has repeatedly expressed itself in no uncertain terms, while construing this and similar statutes. On the second proposition, the lower court has found the facts and set them forth clearly in the certificate. Under both tests the contention of the company is untenable.

In support of contentions of defendant in error, see *Colasurdo* v. *Central R. R. Co.*, 180 Fed. Rep. 832; aff'd 192 Fed. Rep. 901; *Hanley* v. *Southern Ry. Co.*, 187 U. S. 620; *Ill. Cent. R. R. Co.* v. *Nelson*, 203 Fed. Rep. 956; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 21; *Lamphere* v. *Railroad & Navigation Co.*, 196 Fed. Rep. 336; *Mich. Cent. R. R. Co.* v. *Vreeland*, 227 U. S. 65; *Mondou* v. *Railroad Co.*, 223 U. S. 51; *Pedersen* v. *Railroad Co.*, 229 U. S. 146; *Railway* v. *Conley*, 187 Fed. Rep. 951; *Railroad Co.* v. *Darr*, 204 Fed. Rep. 751; *Railway Co.* v. *Earnest*, 229 U. S. 114; *Railway Co.* v. *Seale*, 229 U. S. 156; *Schlemmer* v. *Railroad Co.*, 205 U. S. 10; *Railway Co.* v. *United States*, 231 U. S. 119; *Southern Railway* v. *United States*, 222 U. S. 27; *United States* v. *Great Northern R. R. Co.*, 145 Fed. Rep. 438; *United States* v. *Louis. & Nash. R. R. Co.*, 162 Fed. Rep. 185; *United States* v. *Railroad Co.*, 164 Fed. Rep. 347; *Same* v. *Same*, 154 Fed. Rep. 516; *Same* v. *Same*, 189 Fed. Rep. 964; 1 White, Personal Injuries on Railroads, p. 817; *Zikos* v. *Oregon Railroad Co.*, 179 Fed. Rep. 893.

By leave of the court, *Mr. Alfred L. Becker*, *Mr. Maurice C. Spratt* and *Mr. Lester F. Gilbert* filed a brief as *amici curiæ* in behalf of The New York Central & Hudson River Railroad Co.

Mr. Justice Van Devanter delivered the opinion of the court.

In an action in the Circuit Court for the Eastern District of Louisiana, under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, against a railroad

company, by a personal representative to recover for the death of his intestate, the plaintiff prevailed, and the defendant took the case by writ of error to the Circuit Court of Appeals. That court, desiring instruction upon a question of law arising in the case, certified the question here under § 239 of the Judicial Code. The facts shown in the certificate are these: The intestate was in the service of the railroad company as a member of a crew attached to a switch engine operated exclusively within the city of New Orleans. He was the fireman, and came to his death, while at his post of duty, through a head-on collision. The general work of the crew consisted in moving cars from one point to another within the city over the company's tracks and other connecting tracks. Sometimes the cars were loaded, at other times empty, and at still other times some were loaded and others empty. When loaded the freight in them was at times destined from within to without the State or *vice versa*, at other times was moving only between points within the State, and at still other times was of both classes. When the cars were empty the purpose was usually to take them where they were to be loaded or away from where they had been unloaded. And oftentimes, following the movement of cars, loaded or empty, to a given point, other cars were gathered up and taken or started elsewhere. In short, the crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other. At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the State. The question of law upon which the Circuit Court of Appeals desires instruction is, whether upon these facts it can be said that the intestate at the time of his fatal injury was employed in

interstate commerce within the meaning of the Employers' Liability Act.

Considering the status of the railroad as a highway for both interstate and intrastate commerce the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce. *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co.* v. *United States*, 222 U. S. 20, 26; *Mondou* v. *New York, New Haven & Hartford Railroad Co.*, 223 U. S. 1; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 213; *Minnesota Rate Cases*, 230 U. S. 352, 432. The decision in *Employers' Liability Cases*, 207 U. S. 463, is not to the contrary, for the act of June 11, 1906, c. 3073, 34 Stat. 232, there pronounced invalid, attempted to regulate the liability of every carrier in interstate commerce, whether by railroad or otherwise, for any injury to any employé, even though his employment had no connection whatever with interstate commerce.

Passing from the question of power to that of its exercise, we find that the controlling provision in the act of April 22, 1908, reads as follows: "Section 1. That every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, . . . for such injury or death resulting

in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." Giving to the words "suffering injury while he is employed by such carrier in such commerce" their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employé is engaged is a part of interstate commerce. The act was so construed in *Pedersen* v. *Delaware, Lackawanna & Western Railroad Co.*, 229 U. S. 146. It was there said (p. 150): "There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employé is employed by the carrier in such commerce." Again (p. 152): "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?" And a like view is shown in other cases. *Mondou* v. *New York, New Haven & Hartford Railroad Co., supra; Seaboard Air Line Railway* v. *Moore*, 228 U. S. 433; *St. Louis, San Francisco & Texas Railway Co.* v. *Seale*, 229 U. S. 156, 158; *North Carolina Railroad Co.* v. *Zachary*, 232 U. S. 248, 256; *Grand Trunk Western Railway Co.* v. *Lindsay*, *ante*, p. 42.

Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury.

The question is accordingly answered in the negative.